BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TRACI FRIEND	)	
Claimant	)	
VS.	)	
	)	Docket No. 228,355
HOLIDAY RESORT	)	
Respondent	)	
AND	)	
	)	
BUSINESS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed Administrative Law Judge Brad E. Avery's September 20, 2000, Award. The Appeals Board heard oral argument on February 20, 2001.

APPEARANCES

The claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Ronald J. Laskowski of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record as listed in the Award. The Appeals Board also has adopted the stipulations in the Award with the exception that the parties agreed during the regular hearing, held on March 2, 2000, that the claimant's accident date was July 31, 1997, instead of the previously stipulated June 30, 1997, accident date.

ISSUES

The Administrative Law Judge awarded claimant a 7 percent permanent partial general disability based on permanent functional impairment for a July 31, 1997, work-related accident. The Administrative Law Judge denied claimant's request for a higher work disability award. The Administrative Law Judge also found claimant suffered a separate, nonwork-related intervening accident on October 25, 1999, and denied claimant's request for payment of additional medical expenses and temporary total disability benefits following the October 25, 1999, intervening accident.

On appeal, claimant contends she proved she is entitled to a higher work disability award. Additionally, claimant argues she proved that the October 25, 1999, lifting incident at home was not a separate, intervening accident but was the natural and probable consequence of her July 31, 1997, work-related accident. Accordingly, claimant argues the respondent should be ordered to pay the medical treatment expenses and temporary total disability benefits that resulted from the October 25, 1999, lifting incident.

In contrast, respondent requests the Appeals Board to affirm the Award with one exception. The respondent argues the claimant should not be awarded future medical expenses, even upon application and approval of the Director, because any medical needs that claimant would require in the future would be directly related to the October 25, 1999, intervening accident and would have no relationship with her July 31, 1997, work-related accident.

In summary, the issues on appeal for Appeals Board review are as follows:

1. Was claimant's October 25, 1999, lifting incident at home a new and separate accident or was the reinjury the direct and natural consequence of her July 31, 1997, work-related low back injury?

2. Is respondent responsible for payment of medical treatment expenses and temporary total disability benefits after claimant's October 25, 1999, lifting incident at home?

3. Is claimant entitled to a work disability?

4. Is claimant entitled to future medical treatment upon application and approval of the Director?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board makes the following findings and conclusions:

1. WAS CLAIMANT'S OCTOBER 25, 1999, LIFTING INCIDENT AT HOME A NEW AND SEPARATE ACCIDENT OR WAS THE REINJURY THE DIRECT AND NATURAL CONSEQUENCE OF HER JULY 31, 1997, WORK-RELATED LOW BACK INJURY?

On appeal, there is no dispute between the parties that claimant injured her back transferring a patient while employed by the respondent. Originally claimant alleged a June 30, 1997, accident date but, after claimant testified at the preliminary hearing, the parties agreed claimant established an accident date of July 31, 1997, instead of June 30, 1997.

After claimant's July 31, 1997, accident, respondent voluntarily provided medical treatment through March 31, 1998. Claimant was first treated by respondent's company physicians and then referred to orthopedic surgeon James L. Glenn, M.D., who provided conservative treatment for claimant's low back injury from August 7, 1997, through March 31, 1998.

On March 18, 1998, respondent's insurance carrier sent claimant for a consultation with neurosurgeon Craig H. Yorke, M.D., of Topeka, Kansas. Dr. Yorke reviewed Dr. Glenn's medical treatment records and the results of a CT scan taken on August 7, 1997, which showed a left-sided disk bulge at L4-5. After Dr. Yorke examined the claimant, he recommended further conservative treatment in the form of lumbar extension exercises and a different regimen of physical therapy. The doctor thought that neither surgery, an MRI examination nor epidural steroid injections were needed. Dr. Yorke did not place any restrictions on claimant's activities.

After claimant's July 31, 1997, accident, she was taken off work for approximately two weeks and then was returned to accommodated light duty work feeding patients, working the front desk, answering telephones, and performing other miscellaneous clerical activities. Full time accommodated work was available for claimant, but claimant chose to work less than full time. Claimant testified she chose not to work full time because it was during this period her husband had met an untimely traumatic death. This event had caused claimant some personal problems not related to her work injury.

Claimant voluntarily resigned from her employment with respondent in February 1998. Claimant testified she resigned not because she could no longer do the accommodated work but because her co-workers were making rude comments to her about not being able to do her regular work. At the time that claimant resigned, respondent established through the testimony of claimant's supervisor, Carolyn Sue Ragsdale, that respondent had full time accommodated work available for the claimant at a comparable wage.

After claimant left respondent's employment, she drew unemployment benefits and then went to work for Burger King in April 1998. Claimant worked for Burger King until approximately October 25, 1999. On that date, claimant testified she was giving her one-year old daughter, who weighed approximately 30 pounds, a bath when she felt excruciating pain in her low back as she stretched and lifted her daughter from the bathtub.

After the October 25, 1999, lifting incident, claimant first sought treatment with her family physician, J. Rob Hutchison, M.D. Dr. Hutchison provided claimant with pain medication. But the pain persisted, and Dr. Hutchison placed claimant in a local hospital for pain control therapy for eight days. Claimant made some improvement but the pain still persisted in her low back and radiated down her left leg. During the time that claimant was in the hospital, she underwent an MRI examination of her low back that showed a substantial central and left sided disc herniation at the L4-5 level. Dr. Hutchison then

referred claimant to neurosurgeon Craig H. Yorke, M.D., who had seen claimant previously on March 18, 1998.

Dr. Yorke saw claimant on December 3, 1999. He found claimant with severe left-sided sciatic leg pain. After examining claimant and reviewing the MRI report, Dr. Yorke concluded claimant was in need of surgery and claimant agreed.

On December 6, 1999, claimant underwent an L4-5 discectomy performed by Dr. Yorke. Claimant was off work from Burger King from October 25, 1999, until she was returned to work on January 17, 2000. At the March 12, 2000, regular hearing, claimant testified that her low back condition was improving all the time.

At the request of claimant's attorney, claimant was seen for evaluation and rating by Daniel D. Zimmerman, M.D., of Westwood, Kansas, on two occasions: April 23, 1998 after her July 31, 1997, work-related accident; and, March 6, 2000, following her October 25, 1999, lifting incident and December 6, 1999, surgery.

On April 23, 1998, Dr. Zimmerman reviewed claimant's medical treatment records, took a history from claimant and performed a physical examination of claimant. He concluded that secondary to lumbar disc disease causally related to the accidental injury which occurred while she was employed by the respondent, claimant had sustained a 13 percent permanent functional impairment of the body as a whole. In arriving at this conclusion, Dr. Zimmerman utilized the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He also imposed restrictions on claimant's activities, limiting lifting to 20 pounds occasionally and 10 pounds frequently, recommending claimant avoid frequent flexing of her lumbosacral spine and avoid frequent bending, stooping, squatting, crawling and kneeling activities. Dr. Zimmerman opined that such activities, repetitively carried out or carried out over extended periods of times, would be likely to increase pain and discomfort.

Dr. Zimmerman again examined claimant on March 6, 2000. He understood claimant had been doing well with her low back problem until she had a substantial aggravation of her lumbosacral spine symptomatology when she lifted her child out of the bathtub on October 25, 1999. Dr. Zimmerman opined that the lifting of the child was "the straw that broke the camel's back." He also testified: "But for the work injury of July 29, 1997 [July 31, 1997], which caused the initial pathology within the lumbosacral spine which caused structural weakening of that intervertebral body, it's most improbable using reasonable medical judgment that she would have sustained such an injury from helping a small child out of a bathtub." Dr. Zimmerman increased his impairment of function rating from 13 percent to 16 percent. But, Dr. Zimmerman indicated that 3 percent increase was for bilateral radicular weakness of claimant's lower extremities that he had found during his first examination of claimant on August 23, 1999, and was not an increase due to her subsequent worsening and surgery.

The Administrative Law Judge ordered claimant to undergo an independent medical examination by orthopedic surgeon C. Erik Nye, M.D., of Shawnee Mission, Kansas. Dr. Nye saw claimant on January 26, 1999. After taking a history, reviewing medical treatment records and conducting a physical examination of claimant, Dr. Nye's impression was (1) traumatic HIVD L4-5 with left buttock radiation and (2) degenerative disc changes at L4-5 and L5-S1. He went on to opine that claimant had reached maximum medical improvement. In accordance with the AMA Guides, Fourth Edition, Dr. Nye rated claimant with a 7 percent whole body permanent functional impairment. Dr. Nye found claimant able to work a full 8-hour shift and claimant indicated her low back condition had improved with time.

At Dr. Nye's April 10, 2000, deposition, he was provided with the information concerning claimant's October 25, 1999, lifting incident at home followed by severe left sided sciatic leg pain, the MRI examination showing the herniated disc and Dr. Yorke's discectomy surgery at L4-5. Dr. Nye was asked if he had an opinion within reasonable medical certainty on what was the cause for the need of the discectomy surgery. Dr. Nye replied: "It sounds like she had another traumatic episode." He further testified: "The second episode [October 25, 1999] probably caused the incident that resulted in the surgery being performed, her prior injury [July 31, 1997] being almost 2½ years earlier."

During Dr. Yorke's May 9, 2000, deposition testimony, he admitted the October 25, 1999, incident when claimant lifted her one-year-old daughter contributed in a significant way to claimant's need for surgery. But, Dr. Yorke also testified that multiple traumatic events resulted in claimant's lumbar disc herniation. He testified the 1997 work-related accident contributed as one event and the October 25, 1999, lifting incident at home also contributed. Dr. Yorke, however, admitted that claimant did not need surgery when he saw her initially on March 18, 1998, but did need surgery when he saw her again on December 3, 1999, over two years after the first accident.

Respondent also had claimant examined and evaluated by physical medicine and rehabilitation physician Steven L. Hendler, M.D., of Overland Park, Kansas. Dr. Hendler saw claimant on June 29, 2000. He had claimant's previous medical treatment records to review. After reviewing the medical records, taking a history from claimant and conducting a physical examination of claimant, Dr. Hendler's impression was (1) lumbar strain/sprain with bulging disc, July 31, 1997, (2) herniated nucleus pulposis, October 1999 and (3) post laminectomy, discectomy and foraminotomy, December 6, 1999. Dr. Hendler concurred with Dr. Nye's 7 percent whole body functional impairment rating. The doctor opined that claimant's need for the December 6, 1999, surgery was a direct result of claimant lifting her daughter on October 25, 1999, and not a natural consequence of her July 31, 1997, work-related injury. He based this opinion on the fact that after the October 25, 1999, lifting incident, the MRI showed a herniated disc compared to a bulging disk shown by the CT scan in 1997. Furthermore, claimant did not need medical treatment from March 31, 1998, until the October 25, 1999, lifting incident and claimant did not have severe left-sided sciatic leg pain requiring surgical intervention in 1997.

The Administrative Law Judge found claimant suffered a new and separate traumatic accident when she lifted her child on October 25, 1999. But claimant interprets the opinions of Dr. Zimmerman and Dr. Yorke as persuasive causation evidence that proves claimant's disc herniation and need for the December 6, 1999, surgery was the natural and probable consequence of claimant's July 31, 1997, work-related accident. Accordingly, claimant argues the respondent also should be responsible for the medical treatment expenses and temporary total disability benefits incurred after October 25, 1999.

Under the Kansas Workers Compensation Act, once a work-related injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable, so long as the injury is not shown to have been produced by an independent non-industrial cause.[1] If a new and separate accident results in a subsequent reinjury of the compensable injury, then the resulting injury is not compensable.[2]

The Appeals Board agrees with the Administrative Law Judge and concludes when claimant lifted her child on October 25, 1999, this constituted a new and separate intervening accident causing claimant's L4-5 disc to herniate, resulting in severe left-sided sciatic leg pain and imminent need for discectomy surgery. Thus, the Appeals Board also concludes the October 25, 1999, lifting incident was not the natural and probable consequence of claimant's July 31, 1997, work-related accident. The Appeals Board finds these conclusions are supported by the medical opinions of Dr. Nye and Dr. Hendler plus the fact that claimant, after her July 31, 1997, accident, had made good improvement and had not required any additional medical treatment for that injury from March 31, 1998, until her lifting incident of October 25, 1999.

2. IS RESPONDENT RESPONSIBLE FOR PAYMENT OF MEDICAL TREATMENT EXPENSES AND TEMPORARY TOTAL DISABILITY BENEFITS AFTER CLAIMANT'S OCTOBER 25, 1999, LIFTING INCIDENT AT HOME?

Having found claimant suffered a new and separate nonwork-related intervening accident on October 25, 1999, the Appeals Board affirms the Administrative Law Judge's finding that respondent has no responsibility for the medical treatment expenses incurred nor the additional temporary total disability benefits claimed of 12 weeks for the period from October 25, 1999, until claimant was released to return to work on January 17, 2000.

Although neither noted nor argued by the parties, the Appeals Board finds the Administrative Law Judge made an error in the calculation of the award. The Administrative Law Judge awarded claimant 14.84 weeks of temporary total disability

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[1] *See* Nance v. Harvey County, 263 Kan. 542, Syl. ¶ 3, 952 P.2d 411 (1997).

[2] *See* Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973).

compensation instead of the 2.7 weeks the parties stipulated was paid. The additional weeks of temporary total disability compensation probably came from the 12 weeks of additional compensation requested by the claimant but was denied in the award. Thus, the Appeals Board will correct the computation of the award in this order and change the 14.84 weeks of temporary total disability compensation to the 2.7 weeks as stipulated by the parties.

3. IS CLAIMANT ENTITLED TO A WORK DISABILITY?

The Administrative Law Judge denied claimant's request for work disability and limited the award to 7 percent permanent partial general disability based on the functional impairment rating found by Dr. Nye, the court appointed independent medical examiner.

Claimant contends she proved she left her employment because of rude comments made by co-workers about her injury. Additionally, claimant contends, after her July 31, 1997, injury, she returned to accommodated work at the same hourly rate but worked less hours than she did before her injury.

Carolyn Sue Ragsdale testified that she was claimant's supervisor in 1997 and 1998, after claimant returned to work for the respondent following her July 31, 1997, injury. Ms. Ragsdale established that respondent accommodated claimant in light duty work at the same hourly rate as she worked before her injury. Also, Ms. Ragsdale testified that claimant was offered full time employment but did not want to work full time. The reason claimant did not work full time was not because of her injury but was the result of personal problems associated with the death of her husband. Claimant also admitted, during her regular hearing testimony, that the reason she did not work full time in the accommodated work was because of her personal problems. Additionally, Ms. Ragsdale verified that claimant voluntarily resigned her employment and did not give her work-related injuries as the reason for her voluntary resignation.

Claimant did testify she voluntarily resigned her job with respondent because co-workers were making comments about her not being able to do her regular work. The Appeals Board finds that to terminate ones employment with a respondent that was accommodating the injured worker and to refuse an offer of full time comparable wage employment is not good faith.[3] The record does not contain any evidence that claimant notified respondent of the comments or that she identified this as a problem and the reason for her resignation.

Here, the respondent provided claimant with accommodated employment that claimant admits she could perform. Such accommodated employment paid the same

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[3] *See* Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, Syl. ¶ 2, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999)

wage as claimant was earning before her injury and also offered claimant the same amount of hours. The reason claimant failed to work the same hours was not because of her injury but was for personal reasons not associated with her injury. The Appeals Board concludes that an injured worker is not entitled to a work disability when the worker is capable of performing the accommodated work and refuses to do so.[4]

Thus, the Appeals Board concludes, as did the Administrative Law Judge, that claimant's award is limited to her permanent functional impairment.[5] The Appeals Board also affirms the Administrative Law Judge's finding that the 7 percent functional impairment rating by Dr. Nye, the court appointed independent medical examiner, best represents the permanent affects of claimant's work-related injury.

4. IS CLAIMANT ENTITLED TO FUTURE MEDICAL TREATMENT UPON APPLICATION AND APPROVAL OF THE DIRECTOR?

The respondent argues that claimant is not entitled to future medical treatment, even upon application and approval of the Director. Respondent contends any future medical treatment that may be required for claimant's low back condition would only be related to the October 25, 1997, nonwork-related intervening accident and therefore not respondent's responsibility.

But the Appeals Board concludes, if claimant does require future medical treatment for her low back injury, she should have an opportunity to present evidence as to whether or not the need for the medical treatment is related to her July 31, 1997, low back injury instead of the nonwork-related intervening October 25, 1999, accident. Therefore, the Appeals Board finds the claimant should be entitled to future medical treatment upon application and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Brad E. Avery's September 20, 2000, Award should be, and is hereby, modified as follows:

WHEREFORE, **AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Traci Friend, and against the respondent, Holiday Resort, and its insurance carrier, Business Insurance

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[4] *See* Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *See* K.S.A. 1997 Supp. 44-510e(a).

Company, for an accidental injury which occurred on July 31, 1997, and based upon an average weekly wage of $262.28.

Claimant is entitled to 2.7 weeks of temporary total disability compensation at the rate of $174.86[6] per week or $472.12, followed by 29.05 weeks of permanent partial general disability compensation at the rate of $174.86 per week, or $5,079.68, for a 7% permanent partial general disability, making a total award of $5,551.80, which is all due and owing and is ordered paid in one lump sum, less any amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

Claimant is entitled to any unauthorized medical expense up to the applicable statutory limit upon proper presentation of the statement.

Claimant is entitled to future medical expenses upon proper application and approval of the Director.

The Appeals Board adopts all the remaining orders of the Administrative Law Judge as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Ronald J. Laskowski, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

[6] The Administrative Law Judge computed the award based on a weekly compensation rate of $174.80. The Appeals Board finds the correct weekly compensation rate is $174.86.